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No. ____

IN THE

Supreme Court of the United States

BOOKER T. HUDSON,

Petitioner,

—v.—

MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the inevitable discovery doctrine create a *per se* exception to the exclusionary rule for evidence seized after a Fourth Amendment "knock and announce" violation, as the Seventh Circuit and the Michigan Supreme Court have held, or is evidence subject to suppression after such violations, as the Sixth and Eighth Circuits, the Arkansas Supreme Court, and the Maryland Court of Appeals have held?

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Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (4th ed. 2004).....8

REFERENCE TO OPINIONS BELOW

The June 17, 2004, opinion and the May 1, 2001, order of the Michigan Court of Appeals are unpublished. The January 31, 2005, order of the Michigan Supreme Court is published as *People v. Hudson*, 692 N.W.2d 385 (Mich. 2005), and the December 18, 2001, order of the Michigan Supreme Court is published as *People v. Hudson*, 639 N.W.2d 215 (Mich. 2001). All of these opinions and orders are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of the June 17, 2004, opinion of the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal from that decision on January 31, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On August 27, 1998, several Detroit police officers executed a search warrant on the home of Petitioner Booker T. Hudson. As a result of the search, Petitioner was charged with possession of cocaine and felony firearm.

On April 15, 1999, Petitioner filed a motion in the trial court to suppress the evidence seized from his home. The motion alleged that the evidence had been "obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution," and that the search also violated the state constitution and a state statute requiring police officers to "knock and announce" their presence before serving a search warrant.

At an evidentiary hearing on Petitioner's suppression motion, the prosecution presented a single witness, Officer Jamal Good. Officer Good testified that he did not see any activity inside Petitioner's house as he and the other officer approached to execute the search warrant, nor did he hear any noises coming from inside. App. 8. Officer Good testified that he did not knock before entering Petitioner's home and he did not see any other officers knock. App. 7, 9. Officer Good did announce his presence but waited only three to five seconds before forcibly entering Petitioner's home because that's "how long it took me to go in the door." App. 8.

Given Officer Good's testimony, the prosecutor conceded at the evidentiary hearing that the police violated the "knock and announce" requirement by waiting only three to five seconds before entering the home. App. 9 -10. The trial judge granted Petitioner's motion to suppress the evidence. App. 10.

The prosecution filed an interlocutory appeal of the trial judge's suppression order to the Michigan Court of Appeals. In

its brief, the prosecution argued that the trial court erred in suppressing the evidence because the Michigan Supreme Court had held in *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999), and *People v. Vasquez*, 602 N.W.2d 376 (Mich. 1999), that the inevitable discovery doctrine of *Nix v. Williams*, 467 U.S. 431 (1984), creates a *per se* exception to the exclusionary rule for Fourth Amendment "knock and announce" violations.

In response to the prosecutor's appeal, Petitioner filed a brief in the Michigan Court of Appeals on April 3, 2001, in which he argued at length that *Stevens* and *Vasquez* were wrongly decided, were contrary to the Fourth Amendment, and amounted to misapplications of this Court's decisions in *Williams* and *Wilson v. Arkansas*, 514 U.S. 927 (1995). Defendant-Appellee's Brief on Appeal at 5-15. Petitioner concluded by urging that "[t]he decision of the trial court suppressing the evidence obtained in violation of the Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment to the United States Constitution, should be affirmed." *Id.* at 15.

The Michigan Court of Appeals, however, reversed the suppression order on May 1, 2001. App. 4. In its order, the appellate court observed that it was bound by the Michigan Supreme Court's decisions in *Stevens* and *Vasquez* to hold that "suppression of evidence is not the appropriate remedy when such a violation has occurred." App. 4. [1]

On May 21, 2001, Petitioner filed a timely application for leave to appeal to the Michigan Supreme Court in which he again argued that *Stevens* and *Vasquez* were contrary to the

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[1] Even though Petitioner had argued for suppression under the Fourth Amendment in both the trial court and on appeal, the Michigan Court of Appeals' order reversing the trial court's suppression order does not mention the Fourth Amendment and instead refers only to the state statute requiring the police to knock and announce.

Fourth Amendment and the decisions of this Court. In the brief in support of that application, Petitioner reproduced his Fourth Amendment argument from his Michigan Court of Appeals brief essentially verbatim.

The Michigan Supreme Court denied Petitioner's application by a vote of five to two. App. 5. In its order denying Petitioner's application, the majority observed:

> Although this Court is aware of the decision of the Sixth Circuit Court of Appeals in *United States v. Dice*, [200 F.3d 978, 986 (6th Cir. 2000)], holding that suppression of the evidence is the constitutionally mandated remedy for a violation of the Fourth Amendment "knock and announce" requirement, this Court reaffirms its decision in [*Stevens* and *Vasquez*]. In those cases, this Court held that suppression of the evidence is not the appropriate remedy for a violation of the "knock and announce" requirement under either the Fourth Amendment or [the state constitution]."

App. 5.

Petitioner's case then returned to the trial court. After a bench trial on October 25, 2003, he was convicted of possession of less than 25 grams of cocaine, and acquitted of the felony firearm charge. He was sentenced to 18 months probation.

Following his conviction, Petitioner filed a timely appeal to the Michigan Court of Appeals, and he again argued in his brief that the Fourth Amendment required the suppression of the evidence seized from his home after the "knock and announce" violation. Defendant-Appellant's Brief on Appeal at 6-12. Petitioner summarized his argument by stating:

> The United States Supreme Court has never utilized the "inevitable discovery" doctrine as the Michigan Supreme Court did in *Stevens* and *Vasquez* to purge the unlawful actions of the police officers who actually violated the Fourth Amendment. The evidence obtained in the case at bar was seized by the police in violation of the Fourth Amendment to the United States Constitution and should be suppressed.

Defendant-Appellant's Brief on Appeal at 12.

On June 17, 2004, the Michigan Court of Appeals affirmed Petitioner's conviction. In an unpublished opinion, the court observed that "regardless of the correctness of the decisions in *Vasquez* and *Stevens*, those decisions are binding on this court." App. 1-2.[2]

On August 11, 2004, Petitioner filed a timely application for leave to appeal the affirmance of his conviction to the Michigan Supreme Court. In his application, Petitioner again reproduced essentially verbatim the Fourth Amendment argument from his brief to the Michigan Court of Appeals.

On January 31, 2005, the Michigan Supreme Court denied Petitioner's application. App. 3. One justice would have granted the application in order to reconsider *Stevens*.

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[2] The Michigan Court of Appeals' opinion in 2004, like its opinion in 2001, *see* n. 1, *infra*, mentions only the state's "knock and announce" statute even though Petitioner had primarily raised a Fourth Amendment argument for suppression.

REASONS FOR GRANTING THE WRIT

I. At Least Three Circuits and Three State Courts of Last Resort Have Divided on Whether the Inevitable Discovery Doctrine Creates a *Per Se* Exception to the Exclusionary Rule for Evidence Seized After a Fourth Amendment "Knock and Announce" Violation.

This case squarely presents a Fourth Amendment issue that this Court declined to decide in *Wilson v. Arkansas*, 514 U.S. 927 (1995):

> Respondent and its *amici* also ask us to affirm the denial of petitioner's suppression motion on an alternative ground: that exclusion is not a constitutionally compelled remedy where the unreasonableness of a search stems from the failure of announcement. Analogizing to the "independent source" doctrine applied in *Segura v. United States*, 468 U.S. 796, 805, 813-816 (1984), and the "inevitable discovery" rule adopted in *Nix v. Williams*, 467 U.S. 431, 440-448 (1984), respondent and its *amici* argue that any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation. Because this remedial issue was not addressed by the court below and is not within the narrow question on which we granted certiorari, we decline to address these arguments.

Wilson, 514 U.S. at 937 n.4.

The issue that *Wilson* left open has divided the federal circuits and state courts of last resort. The Seventh Circuit and the Michigan Supreme Court have held the inevitable discovery doctrine creates a *per se* exception to the exclusionary rule for evidence found after a "knock and announce" violation because the police presumably would have found the same evidence if they had knocked and announced. *United States v. Langford*, 314 F.3d 892, 894-95 (7th Cir. 2002), *cert. den.*, 540 U.S. 1075 (2003); *People v. Stevens*, 597 N.W.2d 53, 59-62 (Mich. 1999), *cert. den.*, 528 U.S. 1164 (2000); *People v. Vasquez*, 602 N.W.2d 376, 378-79 (Mich. 1999). By contrast, the Sixth and Eighth Circuits and the courts of last resort in Arkansas and Maryland have squarely rejected claims that the inevitable discovery doctrine should insulate "knock and announce" violations from the exclusionary rule. *United States v. Dice*, 200 F.3d 978, 984-85 (6th Cir. 2000); *United States v. Marts*, 986 F.2d 1216, 1220 (8th Cir. 1994); *Mazepink v. State*, 987 S.W.2d 648, 657 (Ark.), *cert. den.* 528 U.S. 927 (1999); *State v. Lee*, 821 A.2d 922, 931-946 (Md. 2003).

There is, therefore, a split of authority justifying the exercise of this Court's jurisdiction. Indeed, Petitioner's case illustrates the severity of the split. The Michigan Court of Appeals was bound by the Michigan Supreme Court's decisions in *Stevens* and *Vasquez* to admit the evidence found in Petitioner's home despite the prosecution's concession that the police had violated the "knock and announce" requirement. Had Petitioner been charged in federal court in Detroit instead of in a Michigan state court, the district would have been bound by the Sixth Circuit's decision in *Dice* to suppress the very same evidence. Since criminal defendants cannot raise Fourth Amendment issues on federal habeas corpus, *see Stone v. Powell*, 428 U.S. 465 (1976), only a grant of *certiorari* can

resolve the split between the Michigan Supreme Court and the Sixth Circuit.

Certiorari is also appropriate because the decisions in *Stevens*, *Vasquez*, and *Langford* represent a fundamental misunderstanding of the inevitable discovery doctrine announced in *Nix v. Williams*, 467 U.S. 431 (1984). That version of the inevitable discovery doctrine would eviscerate not only the "knock and announce" rule but many other Fourth Amendment doctrines as well.

The Seventh Circuit explained its version of the inevitable discovery doctrine in *Langford*: "The fruits of an unlawful search are not excludable if it is clear that the police would have discovered those fruits had they obeyed the law." 314 F.3d at 895. As Professor LaFave has characterized this argument, "if we hadn't done it wrong, we would have done it right." 6 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 11.4(a) at 272 (4th ed. 2004). *See also id.* at 273 (characterizing *Stevens* as adopting "Alice-in-Wonderland version of inevitable discovery").

By contrast, the Sixth Circuit recognized in *Dice* that the inevitable discovery doctrine properly applies only when the evidence would have inevitably been found by means of an *independent* and *untainted* investigation. 200 F.3d at 986. Thus, the inevitable discovery doctrine does not apply when the very same officers who have violated the Fourth Amendment "knock and announce" requirement simply barge into a home and discover the evidence. *Id.*

The version of inevitable discovery followed by the Seventh Circuit and the Michigan Supreme Court would destroy any incentive the police may have to comply with the "knock and announce" requirement:

> To remove the exclusionary bar from this type of knock-and-announce violation whenever officers possess a valid warrant would in one swift move gut the constitution's regulation of *how* officers execute such warrants. As the *Marts* court observed, the knock-and-announce rule "would be meaningless since an officer could obviate illegal entry in every instance simply by looking to the information used to obtain the warrant. [O]fficers, in executing a valid search warrant, could break in doors of private homes without sanction."

Dice, 200 F.3d at 986 (quoting *Marts*, 986 F.2d at 1220).

Indeed, the same "inevitable discovery" argument accepted in *Langford* could potentially be used to deny suppression of evidence even when the police proceed without a warrant at all. In such cases, the police would only have to show that they could have obtained a warrant and that they would have found the same evidence if they had bothered to do so. If such an argument were accepted, the incentive for the police to obtain a warrant would vanish, just as *Langford*, *Stevens*, and *Vasquez* destroy any incentive the police may have to "knock and announce" before executing a warrant. Therefore, this Court should grant *certiorari* not only to clear up the split of authority on the application of the inevitable discovery doctrine to "knock and announce" violations, but also to clarify the inevitable discovery doctrine itself.

Finally, Petitioner's case is an excellent vehicle to address these issues. There is no dispute that a "knock and announce" violation occurred; indeed, the prosecutor *conceded* the violation at the suppression hearing, and the trial court accordingly ordered the evidence suppressed. App. 9-10.

Given the prosecutor's concession that a "knock and announce" violation occurred, the only Fourth Amendment issue left to be litigated in the state appellate courts was whether *Stevens* and *Vasquez* were correct to hold that the inevitable discovery doctrine creates an exception to the exclusionary rule for all "knock and announce" violations. The issue was squarely presented to the Michigan Court of Appeals and the Michigan Supreme Court in both the prosecution's interlocutory appeal and in Petitioner's direct appeal following his conviction, and the Michigan Supreme Court acknowledged the conflict between its decisions in *Stevens* and *Vasquez* and the Sixth Circuit's decision in *Dice*. App. 3.

In short, this case cleanly presents an important Fourth Amendment issue that has split the federal circuits and state courts of last resort. Review by this Court is therefore appropriate.

CONCLUSION

Therefore, Petitioner Booker T. Hudson respectfully requests that this Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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Dated: March 31, 2005

APPENDIX

APPENDIX

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Booker T. HUDSON, Jr., Defendant-Appellant.

No. 246403.
June 17, 2004.

Before NEFF, P.J., and ZAHRA and MURRAY, JJ.

MEMORANDUM.

Defendant was charged with possession of less than fifty grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. Following a bench trial, he was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and sentenced to eighteen months' probation. Defendant appeals his conviction as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that the evidence, which was seized during the execution of a search warrant, should have been suppressed because the police violated the knock and announce statute, MCL 780.656.

Although the trial court agreed with defendant's argument and initially dismissed the charges, this Court reversed and remanded, ruling that suppression was not an appropriate remedy as stated in *People v. Vasquez (After Remand)*, 461 Mich. 235; 602 NW2d 376 (1999), and *People v. Stevens (After Remand)*, 460 Mich. 626; 597 NW2d 53 (1999). *People v.*

Hudson, unpublished order of the Court of Appeals, entered May 1, 2001 (Docket No. 230594). Our Supreme Court denied leave to appeal. *People v. Hudson*, 465 Mich. 932; 639 NW2d 255 (2001). Because there has not been any change in the law or the relevant facts, this Court cannot, pursuant to the law of the case doctrine, decide the issue any differently on this appeal. *Grace v. Grace*, 253 Mich. App. 357, 362-363; 655 NW2d 595 (2002). Moreover, regardless of the correctness of the decisions in *Vasquez* and *Stevens*, those decisions are binding on this Court. *People v. Beasley*, 239 Mich. App. 548, 559; 609 NW2d 581 (2000).

Affirmed.

Supreme Court of Michigan

People
v.
Booker T. Hudson, Jr.

NO. 126791. COA No. 246403.
January 31, 2005

On order of the Court, the application for leave to appeal the June 17, 2004 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., would grant leave to appeal to reconsider *People v. Stevens,* 460 Mich. 626, 597 N.W.2d 53 (1999).

Court of Appeals, State of Michigan

People of MI v Booker Hudson

Docket No. 230594, LC No. 98-010141
May 1, 2001

ORDER

Kelly, Presiding Judge, Talbot and Collins, Judges

The Court orders that the motion for peremptory reversal under MCR 7.211(C)(4) is GRANTED because the trial court clearly erred in granting defendant's motion to suppress based on the officers' violation of the "knock and announce" statute, MCL 780.656; MSA 28.1259(6). In *People v. Stevens*, 460 Mich 627; 597 NW2d 53 (1999) and *People v. Vasquez*, 461 Mich 235; 602 NW2d 376 (1999), a majority of our Supreme Court unequivocally held that suppression of evidence is not the appropriate remedy when such a violation has occurred.

It appears that the trial court believed that the *Stevens* and *Vasquez* decisions were improperly decided. Regardless of this belief, it is a fundamental and basic tenet of our jurisprudence that a decision of the majority of justices of the Michigan Supreme Court is binding on this Court and the trial courts. *People v. Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000). The trial court disregarded its obligations to follow and be faithful to the law as required by stare decisis. Were all trial courts to engage in such unacceptable conduct as displayed by this trial court, the result would be judicial chaos.

The October 10, 2000, order of the Wayne Circuit Court is REVERSED and the cause is REMANDED for further proceedings. The Court does not retain jurisdiction.

Supreme Court of Michigan

People
v.
Booker T. Hudson

NO. 119294. COA No. 230594.
December 18, 2001

On order of the Court, the application for leave to appeal from the May 1, 2001 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. Although this Court is aware of the decision of the Sixth Circuit Court of Appeals in *United States v Dice*, 200 F 3d 978, 986 (CA 6 2000), holding that suppression of the evidence is the constitutionally mandated remedy for a violation of the Fourth Amendment "knock and announce" requirement, this Court reaffirms its decision in *People v. Stevens (After Remand)*, 460 Mich 626 (1999) and *People v. Vasquez (After Remand)*, 461 Mich 235 (1999). In those cases, this Court held that suppression of the evidence is not the appropriate remedy for a violation of the "knock and announce" requirement under either the Fourth Amendment or Const. 1963, art. 1, § 11. *Stevens,* supra at 635, 643; *Vasquez,* supra at 242.

Cavanagh and Kelly, JJ., would grant leave to appeal.

THIRD CIRCUIT COURT CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN

vs. Case No. 98-10141

BOOKER T. HUDSON, JR.,

EVIDENTIARY HEARING

BEFORE THE HON. DEBORAH A. THOMAS, JUDGE

Tuesday, October 10, 2000, Detroit, Michigan

* * * *

[p. 10]

JAMAL GOOD

DIRECT EXAMINATION

BY MR. McCREEDY [Prosecutor]:

Q: Please tell us your name?

A: Jamal Good.

Q: Your occupation?

A: Detroit Police Officer.

Q: On August 27, 1998, were you employed as a Detroit Police Officer?

A: Yes, I was.

* * * *

[p. 12]

Q: And tell us exactly what you do as you approach this house?

A: I go up to the house. I announce our presence and purpose and make entry into the dwelling.

Q: How do you go about announcing your presence and purpose?

A: I shout out, police, search warrant.

Q: Do you hear anybody else yelling anything as you are going up to the house?

A: I recall other officers saying it, yes.

Q: Other officers were saying that also?

A: Yes.

Q: Once you're up to the door, do you stop or do you go right in?

A: I went right in.

Q: Does anybody knock before going in?

A: I don't recall anyone knocking. I didn't knock, no.

Q: And who was the first person in, if you recall?

A: I was.

[p. 13]

Q: And how much time elapsed between the first time you yelled or anybody that you heard yelled, police, search warant, until the time that you went through that door; how much time elapsed?

A: Maybe five seconds. Three to five seconds, something like that.

* * * *

Q: What was your reason on this day for waiting five seconds or approximately five seconds?

A: About how long it took me to go in the door.

Q: And did others follow behind you?

A: Yes, sir.

Q: Once you got up to the door, were you able to see anything inside before you went in?

A: No, not that I can recall, no.

Q: And how about were you able to hear anything prior to going in?

A: I don't recall hearing anything at all.

[p. 14]

CROSS-EXAMINATION

BY MR. KORN [Defense counsel]:

* * * *

Q: And you didn't see anybody knock on that door, did you?

A: No.

Q: Okay. You yourself didn't knock on the door, did you?

A: No.

[p. 15]

Q: And after you announced your purpose and presence, you went through the door; is that correct?

A: That's correct?

Q: And you said that was in three to five seconds; is that correct?

A: Yes.

Q: So you definitely did not wait to see if anybody would answer the door; is that correct?

A: No, I didn't.

* * * *

[p. 16]

ARGUMENT BY MR. McCREEDY: Well, your Honor as I understand the Knock and Announce statue [sic], knocking is not actually required, just announcing presence and purpose. However, the case law does indicate that the [p. 17] police are supposed to wait until a person who is at the farthest point in the house has an opportunity to answer the door, and the officer admitted that that's not the case here. And between three and five seconds, that's not the case in even the smallest house.

This was a narcotic raid and I wish the law were as it should be that in narcotics, it's different from any other kind of

search warrant raid because there is the possibility of getting shot, possibility of destruction of evidence, that is not the law and I guess I have to concede at this point that technically did violate the search – or the knock and announce statue [sic].

* * * *

[p. 20]

COURT'S RULING

THE COURT: It's a dangerous job and the risks that are involved and it's a balance. It's hard to keep the balance, especially day in and day out. Sometimes the balance works; sometimes the balance doesn't. You just keep trying.

In this particular circumstances, it didn't balance. It still remains a dangerous job. Part of the dangerous job is trying to keep that balance. Motion granted.

(2)

NO. 04-1360

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
October Term, 2004

BOOKER T. HUDSON, JR.,
Petitioner,

vs

STATE OF MICHIGAN
Respondent.

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

ANSWER OF RESPONDENT

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COUNTERSTATEMENT OF THE QUESTION

I.

Exclusion of evidence is only appropriate when to fail to exclude would put the police in a better position than they would have been had the constitutional error never occurred. There is no element of causality between a knock-and-announce violation and the seizure of contraband pursuant to a valid search warrant and a search of proper scope. Does the Fourth Amendment require the exclusion of evidence because of a violation of principles of announcement despite a lack of causal connection between any police error and the discovery of the contraband?

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Statement of Material Facts And Proceedings

Respondent accepts Petitioner's statement for purposes of this response only.

Argument

I.

Exclusion of evidence is only appropriate when to fail to exclude would put the police in a better position than they would have been had the constitutional error never occurred. There is no element of causality between a knock-and-announce violation and the seizure of contraband pursuant to a valid search warrant and a search of proper scope. The Fourth Amendment does not require the exclusion of evidence because of a violation of principles of announcement despite a lack of causal connection between any police error and the discovery of the contraband.

The State cannot contest that the petition here presents a question of importance to the jurisprudence of the Nation, involving a split both in federal circuits and state supreme courts. But Michigan and the seventh circuit, respondent submits, have resolved the question correctly.

The Michigan Supreme Court has held, in the opinion followed by the Michigan Court of Appeals in the present case, that evidence obtained as a result of a search of proper scope pursuant to a valid warrant is not the fruit–there is no causal connection–of a knock and announce defect under the Constitution. *People v. Stevens*, 460 Mich. 626, 631, cert den 528 U.S. 1164, 120 S Ct 1181, 145 L.Ed.2d 1088 (2000). The Arkansas Supreme Court reached the opposite conclusion in *Marzepink v State*, 987 SW2d 648 (1999). And see also *State v. Lee*, 374 Md. 275, 821 A.2d 922 (Md.,2003). State Supreme Courts are thus in disagreement on a question of moment. The Sixth Circuit has also reached a conclusion opposite to the Michigan Supreme Court. See *United States*

v Dice. 200 F 3d 978 (CA 6, 2000), the panel rejecting independent source and inevitable discovery arguments offered by the Government, and failing completely to discuss the absence of causality between the constitutional error and the discovery of the evidence. But the 7th Circuit has reached the same conclusion as the Michigan Supreme Court. See *United States v. Espinoza*, 256 F.3d 718, 726 (CA 7, 2001); *United States v. Langford*, 314 F.3d 892, 894 (CA 7 (Ind.), 2002); *United States v. Jones*, 149 F.3d 715, 716-17 (CA 7, 1998). And it has been said by at least one court that "The Supreme Court has not yet settled whether and to what extent the exclusionary rule applies to knock and announce violations. *See Wilson*, 514 U.S. at 937 n. 4, 115 S.Ct. 1914 (declining to address arguments 'that any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation'"). *Artis v. United States*, 802 A.2d 959, 969 (D.C.,2002). Respondent submits that it is the Michigan Supreme Court and the 7th circuit which resolve the issue correctly.

In *Wilson* v *Arkansas*, 514 US 927, 115 S Ct 1914, 131 L Ed 2d 976 (1995) this Court held that "knock-and-announce" principles are a part of the "reasonableness" required by the Fourth Amendment in the search of a dwelling. The Court, however, did not have occasion to reach the question of whether an exclusionary sanction should apply to a violation, as the State of Arkansas had not determined whether a violation had occurred, the Arkansas Supreme Court having taking the position that no Fourth Amendment question was involved. The State submits that the Michigan Supreme Court has answered this question correctly in *Stevens*, supra.

Assume several examples: 1)the police enter a home and search it with no warrant at all, and no exigent circumstances or any other independent justification; 2)the

police enter a home and search with a search warrant in areas within the home where the items sought could not possibly be found, finding other seizable items instead, and 3)the police enter a home and search it pursuant to a search warrant, finding the items sought in a search of proper scope and intensity, but after having failed to wait after knocking on the door and announcing their presence and purpose for a reasonable time (or having failed to knock and announce at all under conditions that do not excuse the failure). In the first two situations the invasion of privacy simply *should not have occurred at all*. In the first, the entry into the dwelling *should never have occurred*; in the second, the search of certain places within the dwelling should *never have occurred*. The evidence found in each is causally connected to the constitutional error, and exclusion is the result (as a sanction, not a remedy).

But in the third situation, with a valid search warrant, and a search of proper scope, but a "timing" error with regard to entry, was the invasion of privacy—the entry into the home and the search—proper? Surely it *was*—the police had a right under law to make it. Was the seizure of property appropriate? Surely it *was*—the police had a right under law to seize it. Does employing the *same* "sanction" where the police had every right to search and seize, but entered too quickly, as when the police had no right to invade premises and seize property at all make any sense? Surely *not*—in the first two situations privacy has been improperly invaded; but in the third, the knock and announce "failure," it has been *validly* invaded. *Only if knocking and announcing has as a purpose that those inside should be given a fair opportunity either to destroy the evidence sought or to injure the officers executing the warrant does exclusion of the evidence in this situation make sense*. These violations are simply different in *kind*, and, most respectfully, Respondent submits that it is myopic to treat them as though they were not different at all. As Chief Justice Warren noted, in a slightly different context:

> "The exclusionary rule has its limitations as a tool of judicial control....[In] some contexts the rule is ineffective as a deterrent....Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations....[A] rigid and unthinking application of the...rule...may exact a high toll in human injury and frustration of efforts to prevent crime." *Terry* v *Ohio*, 392 US 1, 13-15; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Exclusion of evidence where there has been a valid invasion of privacy, and a proper discovery and seizure of evidence, then, is not, respondent submits, an appropriate sanction for police "error" with regard to announcement of presence and purpose. There is no element of "causality" involved—whether viewed as a part of the doctrine of inevitable discovery, or simply and more logically as a recognition that the discovery of the evidence is not the fruit of a failure to knock and announce, given that the invasion of privacy involved is completely justified—and exclusion makes no sense, simply thwarting the enforcement of the law, and giving unwarranted immunity to one in possession of drugs. Indeed, no court would, for example, suppress where a search of improper scope occurred but where the contraband sought was found within areas that *were* within the scope of the warrant.

In *no other situation* is an exclusionary sanction applied when the result of its application is to put the police in a worse position than they would have been had the Fourth Amendment violation never occurred; *always* it is applied to prevent the police from being in a *better* position *because* of the violation because of a causal connection between the evidence discovered and the constitutional error. See *Nix* v *Williams*, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501 (1984); *Murray* v *United States*, 487 US 533, 101 L Ed 2d

472, 108 S Ct 2529 (1988). See also *United States* v *Jones*, 149 F3d 715 (1998):

> A causal link between unlawful police conduct and a seizure is *necessary but not sufficient* to justify the exclusion of reliable evidence. The inevitable discovery doctrine...and the independent source doctrine...show that violations of the fourth amendment do not automatically lead to suppression when the constitutional wrong plays a causal role in the seizure (at least, in the timing of the seizure). Because the exclusionary rule 'detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions,'...,the Supreme Court is unwilling to sanction its use in marginal cases....*Wilson* reserved the question whether (and, if so, how) the inevitable-discovery and independent-source exceptions to the exclusionary rule apply to searched deemed unreasonable only because officers armed with a warrant failed to make a proper announcement at the door. *It is hard to understand how the discovery of evidence inside a home could be anything but 'inevitable' once the police arrive with a warrant*; an occupant would hardly be allowed to contend that, had the officers announced their presence and waited longer to enter, *he would have had time to destroy the evidence*....But because the entry at the front door played no role in the chain of events leading to Jones's seizure on the lawn, we, too, can leave the inevitable-discovery question for another day (emphasis supplied). 149 F3d at 716.

If one asks the *right* question—is evidence discovered as a result of a search of proper scope and intensity pursuant to the command of a valid warrant the effect or fruit of the failure of the police either to knock and announce or to wait long enough before entering—a negative answer follows ineluctably, *unless* a purpose of the knock-and-announce requirements is to allow those inside an opportunity frustrate the warrant by hiding or destroying evidence or harming the officers who are executing it. The *wrong* question is whether the evidence is the effect or fruit of an "illegal entry" or an "illegal search," as both the entry and the search are legal; it is the *manner* of entry which is improper, and its fruit may be a broken door, and there may be no fruit at all. Exclusion of evidence in this circumstance cannot be squared with *Wong Sun* as there is no exploitation of the primary illegality, the evidence instead being discovered by "exploitation" of the command of the search warrant, not the manner of the entry, and also cannot be squared with either inevitable discovery or independent source principles. The short answer is that *but for causation* is a *necessary* but not sufficient requirement for application of the exclusionary rule, and it is *entirely missing here*. And deterrence may occur through other methods than exclusion of evidence (as it may with other improper searches which yield no fruit usable in a criminal case, or to which the defendant has no standing to object); civil suits can and are brought in these situations. See e.g. *Ayeni* v *Mottola*, 35 F3d 680 (CA 2, 1994); *Kornegav* v *Cottingham*, 120 F3d 392 (CA 3, 1997) (reversing grant of summary judgment in favor of officers executing the warrant); *Aponte Matos* v *Toledo Davila*, 135 F3d 182 (CA 1, 1998) (finding qualified immunity but only because the search took place prior to *Wilson*, and the officers were entitled to immunity as they thus did not violate "clearly established constitutional law" in the manner of entry prior to *Wilson*, a holding which would not obtain to entries after *Wilson)*